FILE COPY

Office - Supreme Court, U. S.
FILED
APR 3 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. ~~902~~ 31

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

FRED J. RICE AND W. CAMERON BURTON, Receivers for D. C. ENGINEERING COMPANY, INC.

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

FREDERIC D. McKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



INDEX.

	Page
Memorandum Brief in Opposition to Petition for a Writ of Certiorari to the Court of Claims	1
Statement	1
Questions Presented Are Not Involved in this Proceeding	2
First Question Presented	2
Second Question Presented	3
Conclusion	5

CASES CITED.

Allen Pope v. United States, 75 Ct. Cls. 436, cert. den. 288, U. S. 610	4
Christie v. United States, 237 U. S. 234	4
Hollerbach v. United States, 233 U. S. 165	4
United States v. Atlantic Dredging Co., 253 U. S. 1	4
United States v. L. P. and J. A. Smith, 256 U. S. 11	4
United States v. Spearin, 248 U. S. 132	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 982

THE UNITED STATES OF AMERICA, *Petitioner*,

v.

FRED J. RICE AND W. CAMERON BURTON, Receivers for D. C. ENGINEERING COMPANY, INC.

MEMORANDUM BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

STATEMENT.

Respondent respectfully represents that the petition for a writ of certiorari to the Court of Claims in the above cause should be denied, as the findings and conclusions of the majority of the Court below are entirely in accord with the decisions of this Court and do not announce any novel or far reaching extension of the law of contract applicable alike to the Government and its contractors, as alleged by petitioner.

Nor does the reasoning of the respective Judges in reaching their conclusions as to the item of delay for which recovery was allowed show any diversity or contrariety of

opinion regarding the point decided and the award made. The majority opinion of Judge Littleton was concurred in by Judges Green and Jones and Chief Justice Whaley, and Judge Green found additional support for the findings and conclusions of the Court in other sections of the contract.

QUESTIONS PRESENTED ARE NOT INVOLVED IN THIS PROCEEDING.

Counsel for the Government seem to regard this case as a sort of Procrustean bed victim, which may be stretched or contracted to fit the questions which they desire to have this Court consider. The fact is that neither of the questions presented, as stated in the petition, is involved in this proceeding.

First Question Presented.

The first question is stated as follows:

> "Whether the United States impliedly warrants that the time for completion specified in a standard form Government construction contract is adequate for the performance of the contractor's work."

In its findings of fact and conclusions of law, the Court of Claims confined plaintiffs' recovery to the sum of $9,349.95, the total extra costs resulting from the stoppage of the work specified in the contract due to 126 days delay "for which plaintiff was in no wise responsible". For the remaining delay and certain other items of plaintiffs' claim, totalling $16,694.69, the defendant was held not responsible. (Op. R. pp. 24-25)

As stated in the summary of facts by petitioner, plaintiff Company was officially notified by the Government to proceed as provided by the contract, (Find. 3, R. 20) and thereafter work was stopped by order of the Government's Contracting Officer because of faulty foundations, (Find. 5, R. 23) forcing a suspension of work by plaintiff Company for

approximately four months. (Find. 7, R. 24). The extra costs found by the Court below to be due plaintiff Company were made up of expenses accruing during this period of suspension and increased costs resulting from the necessity of performing the major portion of its work during the winter months rather than in the spring and summer (Find. 7, R. 25), as contemplated by the contract. (Find. 4, R. 20-21)

The discovery of the faulty foundations necessitated a complete relocation of the hospital building (Find. 5, R. 23), and while the construction contractor was given an *increase* in its contract, in the amount of $68,360.57, for "extra work and delay" resulting from the change, (Find. 5, R. 24) plaintiff Company, under separate contract with the Government to make the plumbing, heating and electrical installations, was given change orders *decreasing* its contract in the net amount of $1,121.00. (Find. 9, R. 26)

Plaintiff Company was denied an increase for its "extra work and delay", because of the erroneous decision of the Contracting Officer, who ruled that no adjustment could be made in the contract of plaintiff Company as no work had been performed under it at the time the change was made, and plaintiff Company was given the alternative by the Contracting Officer of giving up the job and forfeiting its bond or proceeding under the existing contract and filing claim for its excess costs in the Court of Claims. (Find. 6, R. 24)

Obviously, under these circumstances, the question of the Government's warranty of the sufficiency of the time provided for the completion of the contract is not involved. The question was not before or decided by the Court below, and it is not properly presented for review by this Court.

Second Question Presented.

The petition states the second question presented as follows:

> "Whether Article 4 or any other provision of a standard form Government construction contract obli-

gates the United States to compensate a contractor for damages for delay resulting from changes in the plans and specifications of another contractor on account of unforeseen subsurface conditions."

What has been said above would seem sufficient to demonstrate that this question, like the first, is not involved in the proceeding. More specifically, however, all of the plans and specifications were included in one volume and made a part of each of the contracts (Find. 1, R. 17), and the relocation of the building necessitated many changes in the plans and specifications as they related specifically to the work to be done by plaintiff Company. (Find. 9, R. 26)

Plaintiff Company's claim for which the lower Court has given judgment is not for losses suffered as the result of "changes in the plans and specifications of another contractor", but for the damage resulting from the delay caused by the Government in the prosecution of the work of plaintiff Company under its own contract. (Op. R. 31) The question would be exactly the same if there had not been a co-contractor on the job.

This Court many times has passed upon the Government's responsibility for such delays, *United States* v. *L. P. and J. A. Smith*, 256 U. S. 11, citing *Hollerbach* v. *United States*, 233 U. S. 165; *Christie* v. *United States*, 237 U. S. 234; *United States* v. *Spearin*, 248 U. S. 132, and *United States* v. *Atlantic Dredging Co.*, 253 U. S. 1, and at least once has refused to consider the question again upon review from the Court of Claims,—*Allen Pope* v. *United States*, 75 Ct. Cls. 436, certiorari denied 288 U. S. 610.

Likewise, the question of the alleged failure of plaintiff Company to appeal from the decision of the Contracting Officer, which petitioner, in the footnote to its second question presented, says it will urge if certiorari is granted, was never raised in the Court below and is not involved in the proceeding. The responsibility to plaintiff Company of the Government for the delay caused by it, forming the basis

of the award by the Court below, did not in any manner depend upon or relate to any question of fact determinable by the Contracting Officer under the provisions of the contract.

CONCLUSION.

The lower Court correctly has construed the contract in suit as making the Government responsible for a portion of the delay for which it is accountable. If by doing so it has developed a weakness in the form of contract which the Government ordinarily employs, then the standard form should be reframed to meet future cases as they arise, and the solemnly executed agreement of the parties in this case should not be distorted to meet conditions which were not contemplated.

As Judge Littleton pointed out, if the Government desired to relieve itself from responsibility to contractors for excess costs such as here, for which the contractor was in no wise responsible, it should have so provided in the instrument.

It is respectfully submitted that the petition for a writ of certiorari to the Court of Claims should be denied.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
R. AUBREY BOGLEY,
Counsel for Respondent.